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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON

13 JOHN DOE, a New Mexico Resident,

14 Plaintiff,

15 v.

16 THE BOARD OF TRUSTEES OF
17 WHITMAN COLLEGE, a Washington
18 Not for Profit Corporation,
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20 Defendants.
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No. 4:23-cv-5136

COMPLAINT FOR DAMAGES,
DECLARATORY AND
INJUNCTIVE RELIEF

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24 Plaintiff John Doe through undersigned counsel Kammi M. Smith of
25 Witherspoon Brajcich McPhee, PLLC, submit the following complaint against
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27 Defendants:
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COMPLAINT FOR DAMAGES - 1



WITHERSPOON
BRAJCICH
MCPHEE

A PROFESSIONAL LIMITED LIABILITY COMPANY

601 West Main Avenue, Suite 1400

Spokane, Washington 99201-0677

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I. PARTIES

1.1 John Doe is a New Mexico resident currently attending Whitman College.

1.2 The Board of Trustees of Whitman College is a Washington State Not for Profit entity that manages and controls Whitman College located in Walla Walla, Washington (herein after referred to as “Whitman”).

II. JURISDICTION AND VENUE

2.1 This action arises under Title III of the Americans with Disabilities Act (42 USC § 12181 et seq) (ADA), and Section 504 of the Rehabilitation Action (29 USC § 794).

2.2 This Court has jurisdiction over Plaintiff’s federal claims pursuant to 28 USC § 1331 and 1334, and supplemental jurisdiction over Plaintiff’s state law claims pursuant to 28 USC § 1367(a).

2.3 Venue is proper in the United States District Court Eastern District of Washington, as Defendants are located in the Eastern District and all of the acts and omissions alleged herein occurred in the Eastern District of Washington.

Wherefore, reasserting the above, Plaintiffs assert the following:

III. FACTS

3.1 John Doe began his freshman year of college at Whitman in the fall of 2022 as a Physics/3-2 major with a minor in Chinese and a member of one of its NCAA athletic teams. The 3-2 program provides students the opportunity to complete the coursework in three years to earn a BS in Physics at Whitman and earn a BS in Electrical Engineering with two additional years at a partner university.

3.2 John Doe has a diagnosis of Attention Deficit/Hyperactivity Disorder.

3.3 Whitman was informed of this diagnosis before John Doe started attending Whitman. John Doe provided Whitman with his most recent Neuropsychological Evaluation Report, which Whitman accepted.

3.4 On information and belief, the Whitman Academic Resource Center (ARC) did not conduct a fact-specific, individualized analysis of John Doe's circumstances, and did not engage in an interactive dialogue regarding the accommodations John Doe needed, but instead, determined the accommodations unilaterally.

1 3.5 Whitman's ARC issued the following accommodations for John Doe
2 for Spring 2023, in summary:

- 3
4 a) Testing – up to 50% extended time on exams and quizzes;
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6 b) Reasonable extensions on Assignments;
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8 c) Use of audiobooks and audio-enabled documents for
9 assigned readings and handouts.

10 3.6 Despite John Doe's diagnosis, he is a high achieving, highly
11 intelligent student.

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13 3.7 For the Spring 2023 semester, John Doe was enrolled in Calculus III,
14 Physics I, 2nd semester Chinese I, and GENS176 (a required humanities class).
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17 3.8 John Doe personally initiated conversations with each of his
18 professors at the start of the Spring 2023 semester where he advised each of them
19 that he has accommodations in place.
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22 3.9 Additionally, upon information and belief, the ARC sent these
23 accommodations via email to all of John Doe's professors on or about January 18,
24 2023.
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26 3.10 It is ARC's responsibility to make sure that a student's
27 accommodations are being met by the professors.
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1 3.11 On January 31, 2023, John Doe sent an email to Professor Juers
2 (Physics) requesting more time to complete a problem set due that day.
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4 3.12 On February 1, 2023, Professor Juers emailed John Doe and stated
5 that “In general there are no extensions for problem sets. To give you some
6 leeway, though, I delete your two lowest problem set scores at the end of the
7 semester.” Professor Juers’ denial of extra time is in violation of John Doe’s
8 accommodation for extra time on assignments.
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12 3.13 At the beginning of the spring 2023 semester, Professor Lux, John
13 Doe’s GENS 176 professor, issued a class syllabus that included a statement that
14 she does not provide extra time on class projects. This statement is in violation
15 of John Doe’s accommodation for extra time on classwork.
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18 3.14 On or about April 4, 2023, Professor Lux issued an academic concern
19 report regarding concerns over John Doe’s performance in her class. Copies of
20 this report went to the ARC and John Doe’s advisor Kurt Hoffman.
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23 3.15 On April 4, 2023, John Doe received an email from ARC employee
24 Laura Cumming stating in part “we have received a concern about your academic
25 performance in GENS 176 and would like to meet with you to discuss your
26 experiences and work together to ensure you have the support you need for a
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1 successful semester.” Ms. Cumming included comments from Professor Lux that
2 stated in part, “I think the best plan going forward is to really prioritize the daily
3 work for the rest of the semester in order to fix the overall grade.” Nothing in this
4 email was critical of John Doe’s performance regarding the class projects.
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7 3.16 Early in the semester, John Doe requested extra time from Professor
8 Lux to turn in work, which she granted. Thereafter, John Doe turned in certain
9 work late, without requesting additional time before the due dates. Professor Lux
10 accepted this late work without penalty; thus, setting the standard that she would
11 accept work late without additional request from John Doe prior to the due dates.
12 This was consistent with what John Doe was experiencing in another class,
13 Calculus III.
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17 3.17 On May 6, 2023, despite John Doe’s accommodation providing him
18 extra time on assignments that Professor Lux should have been aware of, John
19 Doe unexpectedly received an email from Professor Lux that foreclosed any
20 option of him receiving extra time as required by his accommodation stating, “As
21 you know from my syllabus, I don’t accept late projects”. Professor Lux continued
22 by telling John Doe to talk to his advisor but stated that she did not think he could
23 pass the course with the projects he had missing. Professor Lux sent this email
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1 solely to John Doe and his advisor. She did not send it to ARC and she did not
2 send an academic concern report.
3

4 3.18 John Doe immediately followed Professor Lux's recommendation
5 and attempted to schedule a meeting with his advisor, Mr. Hoffman, who
6 responded "I am leaving town on Monday afternoon to attend a conference this
7 week. I am not sure there is much to talk about related to this news from Prof.
8 Lux. If you need to retake Gens 176 next Spring, then that will have an impact
9 on other course choices. In addition, I am concerned that this will really make
10 meeting the GPA requirements for the 3-2 program difficult to achieve."
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15 3.19 Mr. Hoffman was aware of John Doe's accommodations.
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17 3.20 Despite the presence of John Doe's accommodation providing for
18 extra time on assignments, Mr. Hoffman did not challenge professor Lux's
19 position and did not suggest that John Doe should challenge her position or point
20 out that her refusal to accept late projects was a violation of his accommodation.
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23 3.21 John Doe also immediately scheduled a meeting with Associate
24 Athletic Director Mr. Albert Reiser for Monday May 8, 2023, where they
25 strategized on how to succeed in all of Doe's classes.
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3.20 John Doe and Reiser discussed whether John Doe could pass GENS 176 if he turned in the missing assignments. They concluded that based on Professor Lux's email, it was unlikely that he could pass, because she was unwilling to allow him extra time on the projects.

3.21 Regardless, John Doe followed up with Professor Lux on May 10, 2023 via email and stated, "I want to confirm that even if I were to submit the rest of the homework assignments and the Writers Bing assignments, I do not think I can pass the class in my current state."

3.22 In response on May 11, 2023, Professor Lux again ignored John Doe's accommodation and stated in part, "I totally understand."

3.23 John Doe met with athletic coach Brian Kitamura on May 1, 2023 to review John Doe's current grades and strategize a plan of improvement. John Doe was successful in improving his grades in classes where late assignments were accepted. John Doe's grades at the end of the semester were:

<u>Class</u>	<u>Semester Grades</u>
Calculus:	83.7%
GENS 176:	30.7%
Physics I:	80.7%
Chinese:	92.7%

1 3.24 On July 25, 2023, Helen Kim, Whitman's Associate Dean of
2 Academic Affairs, relayed to John Doe and his parents a note from Professor Lux
3 stating that she
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5 “would be very supportive of a retroactive ‘withdrawal’ from the
6 class in order to give him a clean-slate for taking the class again next
7 year. I see how my policy could be read as never accepting late
8 work even in cases of accommodations, and I am changing the
9 wording to make this clear in the future... I am fully in support of a
10 withdrawal.”

11 3.25 Based on recommendation from Ms. Kim, and consistent with
12 Professor Lux's position, a Petition to the Board of Review was filed on August
13 3, 2023 asking for the GENS 176 grade to be changed to a withdrawal. An
14 amendment filed on John Doe's behalf then requested that GENS 176 be
15
16 completely removed from his transcript.
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18 3.26 On September 8, 2023, John Doe received a response from the
19 Petition to the Board of Review denying John Doe's petition because they thought
20 John Doe had the “responsibility to initiate a discussion with Prof. Lux about how
21 accommodations could be utilized.” The Board's response ignores statements by
22 Professor Lux in her class syllabus and her May 6, 2023 email to John Doe where
23 she denied extra time on projects that comprise 55% of her students' grades, her
24 subsequent acknowledgement of how her policy could be understood to never
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1 provide extra time despite accommodations, and the ensuing confusion her
2 statements caused John Doe. Whitman's arbitrary and inconsistent application of
3 generic accommodations created a largely unnavigable academic environment
4 that wrongfully and materially compromised John Doe's ability to access the
5 curriculum.
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9 3.27 Regarding the denial of accommodation in Physics I, Ms. Kim
10 recommended that a grievance be filed. On August 31, 2023, a grievance was
11 submitted to Ms. Cassandre Beccai, Whitman Director of Equity and Compliance.
12 The grievance addressed both the Physics I and GENS 176 failures to
13 accommodate John Doe. To date, no investigation has begun in response to this
14 grievance.
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18 3.28 During the 2022-2023 academic year, the Director of ARC position
19 was vacant. The ARC staff reported to Ms. Helen Kim, Associate Dean of
20 Academic Affairs. When the John Doe family began interfacing with Ms. Kim
21 over these matters in July 2023, Ms. Kim admitted not previously knowing of
22 John Doe or his accommodations. On information and belief, the ARC staff
23 lacked any meaningful supervision during the 2022-2023 academic school year.
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**IV. CAUSES OF ACTION I:
Americans with Disabilities Act Failure to Accommodate**

4.1 Plaintiff re-alleges and incorporates by reference all previous paragraphs.

4.2 Congress enacted the Americans with Disabilities Act (ADA) because discrimination against individuals with disabilities continues to be a “serious and pervasive social problem.” 42 U.S.C. §12101(a)(2).

4.3 A violation of the ADA occurs when a public accommodation fails “to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.” 42 U.S.C. §12182(b)(2)(A)(ii).

4.4 At all relevant times, Whitman has been a “public accommodation” within the meaning of the ADA and offered educational services, programs, and activities.

4.5 At all relevant times, Plaintiff has been a qualified individual with a disability within the meaning of the ADA and met the essential eligibility

1 requirement for the receipt of the aids, benefits, services, programs and activities
2 of Whitman.

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4 4.6 At all times, Whitman was aware of Plaintiff's disability.

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6 4.7 Through the acts and omissions of Whitman and its agents and
7 employees, Whitman, with intent, deliberate indifference, and/or reckless
8 disregard, subjected Plaintiff to discrimination on the basis of his disability in
9 violation of the ADA, by failing to provide reasonable accommodations to
10 Plaintiff.
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13 4.8 Whitman could have reasonably provided all aids, benefits, services,
14 programs, and activities in an accessible manner and on an equal basis to Plaintiff,
15 to allow him a full, meaningful, and substantially equal opportunity to participate.
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18 4.9 As a direct and proximate result of Whitman's conduct, Plaintiff has
19 suffered humiliation, hardship, anxiety, indignity, and other significant mental
20 and emotional anguish; sacrificed his college success; and lost his opportunity to
21 complete his Physics/3-2 program with the hope of being accepted into a top-rated
22 Engineering program for the last two years of his education.
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26 4.10 Plaintiff is entitled to declaratory and injunctive relief, and
27 reasonable attorneys' fees and costs incurred in bringing this action.
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**V. CAUSE OF ACTION II:
Violation of Section 504 of the Rehabilitation Act**

5.1 Plaintiff re-alleges and incorporates by reference all previous paragraphs.

5.2 Section 504 of the Rehabilitation Act ("Section 504") provides in pertinent part: "No otherwise qualified individual with a disability... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...." 29 U.S.C. §794.

5.3 At all times, Plaintiff has been a qualified individual with a disability within the meaning of Section 504 and met the essential eligibility requirement for the receipt of the aids, benefits, services, programs, and activities of Whitman College.

5.4 At all times, Whitman was aware of Plaintiff's disability.

5.5 At all times, Whitman was the recipient of federal financial assistance within the meaning of Section 504.

5.6 At all times, Whitman is a college or University required to comply with Section 504. 29 U.S.C. §794(b)(2)(A).

1 5.7 Through their acts and omissions, Whitman violated Section 504,
2 including, without limitation, the following: “A recipient to which this subpart
3 applies shall take such steps as are necessary to ensure that no handicapped
4 student is denied the benefits of, excluded from participation in, or otherwise
5 subjected to discrimination because of the absence of educational auxiliary aids
6 for students with impaired sensory, manual or speaking skills.” 34 C.F.R.
7 §104.44(d).
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12 5.8 Through the acts and omissions of Whitman and its agents and
13 employees, Whitman committed the acts and omissions alleged herein with intent,
14 deliberate indifference, and/or reckless disregard of Plaintiff’s rights.
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17 5.9 As a direct and proximate result of Whitman’s conduct, Plaintiff has
18 suffered humiliation, hardship, anxiety, indignity, and other significant mental
19 and emotional anguish; sacrificed his college success; and lost his opportunity to
20 complete his Physics/3-2 program with the hope of being accepted into a top-rated
21 Engineering program for the last two years of his education.
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25 5.10 Plaintiff is entitled to damages to be proven at the time of trial, and
26 his reasonable attorneys’ fees and costs incurred in bringing this action.
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**VI. CAUSE OF ACTION III:
Violation of the Washington Law Against Discrimination
and Reasonable Accommodation**

6.1. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

6.2 The Washington Law Against Discrimination (WLAD) provides the right to be free from discrimination because of any sensory, mental or physical disability to fully enjoy any accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement. RCW 49.60.030.

6.3 RCW 28B.10.912 also ensures students with disabilities are reasonably accommodated by institutions of higher education.

6.4 At all times, Plaintiff was a qualified individual with a sensory, mental or physical disability, whose disability was medically cognizable or diagnosable, and exists as a record.

6.4 At all times, Whitman was aware of Plaintiff's disability.

6.5 At all times, Whitman is an educational institute defined by RCW 49.60.040 (2).

1 6.6 Through the acts and omissions of Whitman and its agents and
2 employees, Whitman committed the acts and omissions alleged herein with intent,
3 deliberate indifference, and/or reckless disregard of Plaintiff's rights.
4

5 6.7 As a direct and proximate result of Whitman's conduct, Plaintiff has
6 suffered humiliation, hardship, anxiety, indignity, and other significant mental
7 and emotional anguish; sacrificed his college success; and lost his opportunity to
8 complete his Physics/3-2 program with the hope of being accepted into a top-rated
9 Engineering program for the last two years of his education.
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12 6.8 Plaintiff is entitled to damages to be proven at the time of trial, and
13 his reasonable attorneys' fees and costs incurred in bringing this action.
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17 **VII. CAUSE OF ACTION IV:**
18 **Negligence**

19 7.1 Plaintiff re-alleges and incorporates by reference all previous
20 paragraphs.
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22 7.2 At all relevant times, Whitman, its agents, employees and directors
23 owed a duty of care to Plaintiff to provide him with an equal educational
24 opportunity as non-disabled students enrolled in its program, including providing
25 reasonable accommodations so that he had equal opportunity to learn the
26 curriculum and pass his courses with the highest grades possible.
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1 7.3 Whitman breached its duty of care to Plaintiff by failing to provide
2 reasonable accommodations that had been timely requested and approved, which
3 caused him to fail GENS 176 and get a lower grade in Physics, which will in turn
4 cause him to lose the opportunity to be accepted into a top-rated Engineering
5 program for the last two years of his education.
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8 7.4 As a direct and proximate result of Whitman's conduct, Plaintiff has
9 suffered humiliation, hardship, anxiety, indignity, and other significant mental
10 and emotional anguish, and sacrificed his college success.
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13 7.5 Plaintiff is entitled to damages in an amount to be proven at the time
14 of trial.
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17 **VIII. CAUSE OF ACTION V:**
18 **Breach of Contract**

19 8.1. Plaintiff re-alleges and incorporates by reference all previous
20 paragraphs.
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22 8.2 Generally, the relationship between students and colleges is
23 contractual in nature.
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25 8.3 Whitman owed a contractual duty to Plaintiff to abide by state and
26 federal discrimination and reasonable accommodation laws.
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1 8.4 Whitman owed a contractual duty to adequately supervise the
2 professors and Whitman employees in providing reasonable accommodations.
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4 8.5 Whitman owed a contractual duty to re-evaluate the professors and
5 employees conduct through the Board of Review Petition and the Grievance
6 procedure.
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8 8.6 Whitman breached these duties.
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10 8.7 Whitman's breach proximately caused Plaintiff to suffer humiliation,
11 hardship, anxiety, indignity, and other significant mental and emotional anguish;
12 sacrifice his college success; and lose his opportunity to complete his Physics/3-
13 2 program with the hope of being accepted into a top-rated Engineering program
14 for the last two years of his education.
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18 8.8. Plaintiff is entitled to damages to be proven at the time of trial, and
19 his reasonable attorneys' fees and costs incurred in bringing this action.
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22 **IX. CAUSE OF ACTION VI:**
23 **Breach of the Covenant of Good Faith and Fair Dealing**
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25 9.1 Plaintiff re-alleges and incorporates by reference all previous
26 paragraphs.
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1 9.2 A covenant of good faith and fair dealing exists in the performance
2 of a contractual obligation.
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4 9.3 Whitman had a contractual obligation to provide Plaintiff with
5 reasonable accommodations.
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7 9.4 Whitman professors and Whitman employees, as agents of Whitman,
8 failed to provide the reasonable accommodations.
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10 9.5 Whitman failed to remedy the violation when requested under the
11 Board of Review Petition.
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13 9.6 Whitman has failed to promptly investigate the grievance that
14 Plaintiff submitted to it.
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16 9.7 Such failures are a breach of the covenant of good faith and fair
17 dealing that exists with every contract.
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20 9.8 As a direct and proximate result of Whitman's conduct, Plaintiff has
21 suffered humiliation, hardship, anxiety, indignity, and other significant mental
22 and emotional anguish; sacrificed his college success; and lost his opportunity to
23 complete his Physics/3-2 program with the hope of being accepted into a top-rated
24 Engineering program for the last two years of his education.
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1 9.9 Plaintiff is entitled to damages to be proven at the time of trial, and
2 his reasonable attorneys' fees and costs incurred in bringing this action.
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4 **X. CAUSE OF ACTION VII:**
5 **Negligent Supervision**

6 10.1 Plaintiff re-alleges and incorporates by reference all previous
7 paragraphs.
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9 10.2 Whitman had a duty to supervise ARC staff to ensure that the ARC
10 staff conducted a fact-specific, individualized analysis of John Doe's
11 circumstances when creating John Doe's accommodations.
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13 10.3 Whitman further had a duty to supervise its professors and ARC staff
14 to ensure they provided the reasonable accommodations that had been established.
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16 10.4 Whitman failed to supervise ARC staff and its professors resulting
17 in their failing to provide reasonable accommodations.
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19 10.5 As a direct and proximate result of Whitman's conduct, Plaintiff has
20 suffered humiliation, hardship, anxiety, indignity, and other significant mental
21 and emotional anguish; sacrificed his college success; and lost his opportunity to
22 complete his Physics/3-2 program with the hope of being accepted into a top-rated
23 Engineering program for the last two years of his education.
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1 11.5 Plaintiff is entitled to damages to be proven at the time of trial, and
2 his reasonable attorneys' fees and costs incurred in bringing this action.
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4 **XI. DEMAND FOR RELIEF**

5 Plaintiff request judgment as follows:
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7 11.1 Statutory and compensatory damages as permitted by law and
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9 proven at trial;

10 11.2 Injunctive relief;
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12 11.3 Attorney fees and costs as allowed by law.
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15 Respectfully submitted this 29th day of September 2023.
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17 WITHERSPOON BRAJCICH MCPHEE, PLLC
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19
20 By: /s/ Kammi M. Smith
21 Kammi Mencke Smith, WSBA #34911

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27 Email: ksmith@workwith.com

28 Attorney for John Doe
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing *Complaint for Damages* through the Court's CM/ECF system on the 29th day of September 2023. Notification of this filing will be automatically sent to all counsel of record.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 29th day of September 2023.

/s/ Kammi M. Smith

Kammi M. Smith, WSBA #34911